Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-2761

JOHN L. ZELKER, Superintendent, Green Haven Correctional Facility, Stormville, New York,

Petitioner,

against

JOSEPH RANDAZZO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, the Superintendent of the New York State Correctional Facility in which respondent is presently incarcerated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Joseph Randazzo* v. *Follette* (judgment entered June 17, 1971).

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is appended hereto *infra* as Appendix "A". The opinion of the District Court, which is reported at 282 F. Supp. 2 (S.D.N.Y., 1968), is appended hereto *infra* as Appendix "B".

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on June 17, 1971 reversing the dismissal of respondent's petition for a writ of habeas corpus by the United States District Court for the Southern District of New York. The decision remanded the cause to the District Court for a hearing on the issue of whether respondent's appeal taken twenty years ago in 1950 was improperly frustrated. Application was made to the Court of Appeals for a stay pending the filing and disposition of this petition for certiorari. That application was granted on July 23, 1971.

Question Presented

Whether a state prisoner who claims that his direct appeal taken in 1950 was improperly frustrated within the State's appellate system must demonstrate that an appeal would have arguable merit before relief can be granted on federal habeas corpus?

Statement of the Case

State Court Proceedings

On September 23, 1948 respondent was indicted by the Grand Jury of New York County for the crime of murder in the second degree (New York Penal Law of 1909, § 1046). He was convicted after a trial by jury, in the then Court of General Sessions, New York County, of manslaughter in the first degree (Penal Law of 1909, § 1050) and sentenced on February 17, 1949 to a term of imprisonment of six to twenty years (SCHURMAN, J.). Respondent was represented at trial and sentencing by retained counsel, Morris Dickman, Esq.

Respondent contracted with Mr. Dickman to take an appeal from the judgment of conviction. A timely notice of appeal was filed by counsel on March 11, 1949. On July 12, 1949 the Appellate Division, First Department granted leave to proceed on the original record with printed briefs. The Court also enlarged respondent's time to perfect his appeal until September 2, 1949.

No record or brief having been filed by that date, the People moved to dismiss the appeal for lack of prosecution. Notice of the motion was given to Mr. Dickman but not to respondent personally. On February 1, 1950 the motion to dismiss was granted by the Appellate Division "no one appearing in opposition thereto".

On March 26, 1957 respondent was released from State Prison on parole. He was arrested on July 12, 1962 pursuant to the authority of a parole violation warrant. On August 31, 1962 respondent was indicted by the Grand Jury of New York County for the subsequent crimes of possession of narcotic drugs with intent to sell and possession of narcotic drugs (Penal Law of 1909, §§ 1751[2], [3]).

Respondent pleaded guilty in Supreme Court, New York County to attempted possession of a narcotic drug (Penal Law of 1909, § 1751[5]) and was sentenced on December 20, 1962, as a second felony offender, to a term of three to six years in State Prison (DAVIDSON, J.).

In March 1964 respondent moved in the Appellate Division, First Department for an order reinstating his appeal from the manslaughter conviction. On April 28, 1964 the Appellate Division denied respondent's motion without opinion.

On July 1, 1964 respondent brought an application for a writ of error coram nobis in Supreme Court, New York County. Respondent alleged that his manslaughter conviction was invalid because the appeal has been dismissed

in the Appellate Division "without giving notice to him of said dismissal". Respondent also alleged: (1) that the motion to dismiss was made when Morris Dickman, his appellate counsel, "had been either in his final hours of a fatal illness or, . . . had in fact expired"; (2) that his numerous letters to the Appellate Division and to Mr. Dickman "during the appeal period went consistently unanswered".

Respondent's coram nobis application was denied without a hearing on September 24, 1964 (POSTEL, J.). Justice Postel held that New York Code of Criminal Procedure § 537a which requires that all defendants must be notified when their appeal is dismissed for lack of prosecution "was effective as of September 1, 1963—and is not retroactive". The Appellate Division, First Department unanimously affirmed, without opinion, on March 2, 1965 *People* v. *Randazzo,* 23 A.D. 2d 722. Leave to the New York Court of Appeals was denied on April 9, 1965 (FULD, J.).

On September 7, 1965 respondent brought a second application for writ of error coram nobis in the Supreme Court, New York County. Respondent alleged that he was deprived of his right to appeal from the manslaughter conviction by the failure of the District Attorney to give him notice of the motion to dismiss the appeal. Respondent also alleged that he was deprived of his right to appeal because of the death or incapacitation of counsel "during the critical appeal period" or because of counsel's "unilateral failure to perfect the appeal after having accepted a fee and having contracted to go ahead."

By a supplemental affidavit, dated September 20, 1966, respondent claimed for the first time contrariwise that he was not able to appeal his manslaughter conviction by reason of indigency. Respondent alleged, in substance, that his appellate counsel, Mr. Dickman, had been retained by his father that counsel had failed to perfect the appeal because respondent's family could not raise the neces-

sary funds to pay the expenses of the appeal and legal fees.

Respondent's second coram nobis application was denied without a hearing on November 3, 1966 (SCHWEITZER, J.). Justice Schweitzer held that respondent's contentions with respect to lack of notice and ineffective assistance of counsel were foreclosed by the decision upon the 1964 coram nobis application. Justice Schweitzer also held that respondent's "unsupported allegation of indigency, together with the uncorroborated story of his father's dealings with Mr. Dickman, now espoused for the first time in 16 years and contrary to his prior assertion that he had 'contracted' with Mr. Dickman, . . . [were] products of his imagination."

At or about the same time this application was pending, respondent brought a separate and distinct application in Supreme Court, New York County for a *Huntley* hearing as to the voluntariness of certain oral admissions made to Detective John O'Hara on December 2, 1948. Respondent's application was denied without a hearing on December 3, 1966 (SCHWEITZER, J.). Justice Schweitzer held that "[i]n as much as there was no issue raised either on the trial or in the Judge's charge regarding the voluntariness of any statement made by . . . [respondent], there is no requirement that a hearing be held."

Respondent appealed to the Appellate Division, First Department from the denial of both applications by Justice Schweitzer. The appeals were consolidated and on June 20, 1967 the Appellate Division unanimously affirmed, without opinion *People* v. *Randazzo,* 264 N.Y.S. 2d 641. Leave to appeal to the New York Court of Appeals was denied on October 4, 1967 (FULD, J.).

Federal Court Proceedings

On April 15, 1965 respondent brought an application for writ of habeas corpus in the United States District Court

for the Southern District of New York *United States ex rel. Randazzo* v. *Follette*, 65 Civ. 1179. In this application respondent alleged that the failure of the District Attorney to give him notice of the motion to dismiss his appeal violated due process of law. Respondent further alleged that he was deprived of effective assistance of counsel on the appeal for the following reasons: (1) counsel was dead or mortally ill during "the critical appeal period"; [or] (2) counsel's unilateral decision not to prosecute the appeal constituted "fraudulent misrepresentation".

On June 15, 1967 respondent's application for writ of habeas corpus was denied without an evidentiary hearing (CROAKE, J.). Judge Croake held that respondent's claim of lack of notice was without merit. Judge Croake also held that respondent had failed to exhaust his applicable state remedies with respect to the ineffective assistance of counsel claim.

On July 17, 1965 Judge Croake issued a certificate of probable cause, granted leave to proceed *in forma pauperis* and assigned counsel on the appeal. The order denying habeas corpus relief was affirmed *from the bench* by the United States Court of Appeals for the Second Circuit on June 17, 1966.

In December, 1967 respondent commenced the instant habeas corpus proceeding in the Southern District of New York. *United States ex rel. Randazzo* v. *Follette*, 67 Civ. 4790. Respondent alleged that he was deprived of his right to appeal from the manslaughter conviction for the following reasons: (1) lack of notice of the motion to dismiss; (2) ineffective assistance of counsel; (3) indigency. Respondent also alleged that he was improperly denied a *Huntley* hearing in the state courts.

Respondent's application for a writ of habeas corpus was denied without an evidentiary hearing on March 26, 1968 (WYATT, J). Judge Wyatt held, that even if respond-

ent's 1950 appeal had been frustrated, respondent was not prejudiced since the errors which he claimed had occurred at his trial were without merit. Judge Wyatt also held that respondent was not entitled to an evidentiary hearing as to the voluntariness of his oral admissions to Detective O'Hara (282 F. Supp. 2, 9 [S.D.N.Y. 1968]).

On April 4, 1968 Judge Wyatt granted a certificate of probable cause and leave to proceed *in forma pauperis*. On June 4, 1968, the United States Court of Appeals for the Second Circuit granted respondent's motion for assignment of counsel on the appeal.

On June 17, 1971 the Court of Appeals reversed the order of the District Court dismissing respondent's petition for a writ of habeas corpus and remanded with instructions to hold a hearing on the question of whether respondent's appeal from the manslaughter conviction was improperly frustrated. The Court concluded that "the merits of . . . [respondent's] aborted direct appeal are not to be considered in this habeas corpus petition for the purpose of deciding prejudice".

Reasons for Granting the Writ

I. The decision below is in direct conflict with decisions in other circuits and with the pronouncements of the Court.

In holding that a state prisoner who claims that his direct appeal was improperly frustrated can obtain relief on habeas corpus without a showing of merit, the Second Circuit has brought itself into conflict with the rulings in *Henderson* v. *Cardwell*, 426 F. 2d 150 (6th Cir. 1970); *Victor* v. *Lane*, 394 F. 2d 268 (7th Cir. 1968); *Buster* v. *Hocker*, 428 F. 2d 820 (9th Cir. 1970); and *McGarry* v. *Fogliani*, 370 F. 2d 42 (9th Cir. 1966).

In *Rodriguez* v. *United States*, 395 U.S. 327, 329-30 (1969), this Court held that federal prisoners seeking be-

lated appeals pursuant to 28 U.S.C. § 2255 are not required to disclose what errors they would raise on appeal. However, this Court has never applied its decision in *Rodriguez* to state criminal cases.

II. The decision of the Court of Appeals, if permitted to stand would have a substantial deleterious effect upon the administration of justice.

Petitioner agrees with the Second Circuit that "state issues should be decided by a state appellate court after argument by counsel there and not by a federal court without a hearing". Nevertheless, petitioner is constrained to seek reversal of the judgment below because the decision of the Court of Appeals, by dispensing with the requirement that there be at least showing of arguable merit in order to obtain a belated appeal, will have a deleterious effect upon the administration of justice.

In the instant case, respondent has alleged that his 1950 appeal was improperly frustrated because of ineffective assistance of counsel and indigency. Respondent's contentions are based primarily upon conversations which allegedly took place between his family and his appellate counsel, Morris Dickman, Esq. However, Mr. Dickman died in 1953, almost fourteen years before respondent commenced the instant habeas corpus proceeding. Under these circumstances, petitioner has been substantially prejudiced by the decision of the Court of Appeals. See *Jenkins* v. *United States*, 399 F. 2d 981 (D. C. Cir. 1968).

The decision below should also be reversed because it needlessly encourages frivolous proceedings in the state courts. As stated by the Court of Appeals for the Seventh Circuit: "[a] frivolous appeal is utterly useless. If the appeal would have been frivolous if timely, defendants have lost nothing by failure to appeal within time or refusal of a belated appeal" *Victor* v. *Lane*, 394 F. 2d 268, 270 (1968).

Finally, it should be observed that, in a large number of cases, belated appeals ordered on federal habeas corpus will never be heard because of the absence of a trial transcript.* Prosecutors will be faced with the unenviable choice of releasing these defendants or attempting to hold a new trial. As stated by Justice Friendly in his dissenting opinion in *United States ex rel. Smith* v. *McMann*, 417 F. 2d 648, 659 (2nd Cir. 1970), *cert. den.* 397 U.S. 925:

> "In many instances the desired appeal cannot now be had because of unavailability of transcript. Both in such cases and in those where the appellate court detects error, only in rare instances relating to the basic issue of innocence, a new trial would confront 'the familiar difficulties of proof long after the event'."

The difficulties and confusion engendered by the *Randazzo* decision will be compounded in its effect upon recidivist sentencing. The laws of all of the states and the federal and District of Columbia Criminal Codes contain provisions imposing additional punishment upon multiple offenders see *Spencer* v. *Texas*, 385 U.S. 554, 559-60 (1967). Unless the decision below is reversed, many individuals currently in prison as well as many who will be convicted in the future will be able to challenge prior convictions sought to be used as predicates for multiple offender sentencing. Many of these prior convictions will be subject to vacatur, on technical grounds, because of a difficult to disprove claim that a defendant's appeal was improperly frustrated within the State's appellate system.

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* In New York, court stenographers are required to retain their untranscribed minutes for two years. New York Judiciary Law, § 297. Respondent filed a notice of appeal from his manslaughter conviction so that a transcript exists.

III. The decision below conflicts with this Court's harmless error rule.

Assuming *arguendo*, that appellant's 1950 appeal was improperly frustrated, there still remains the question of whether this error was harmless. After examining the state court record, the District Court concluded that an appeal would be frivolous. The Court of Appeals found this consideration to be irrelevant. This Court has ruled that some, but not all constitutional errors may be harmless. See, *e.g. Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967). If an appeal in Randazzo's case would be frivolous, a denial of his right to appeal should be considered harmless. In *Rodriguez* v. *United States*, 395 U.S. 327 (1969), this court took a contrary position insofar as federal criminal matters are concerned. Whether *Rodriguez* should be applied to state criminal cases presents an important question which should be considered by this Court.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: New York, New York, August 16, 1971.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 838—September Term, 1970.

(Argued April 16, 1971 Decided June 17, 1971.)

Docket No. 32325

UNITED STATES *ex rel.* JOSEPH RANDAZZO,

Appellant,

—v.—

HON. HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Respondent.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Petitioner seeks review of the denial without a hearing, United States District Court for the Southern District of New York, Wyatt, *J.*, of his petition for a writ of habeas corpus to reinstate his New York State appeal from a manslaughter conviction. Reversed and remanded for further proceedings.

PHYLIS SKLOOT BAMBERGER, The Legal Aid Society of New York, New York City, *for Appellant.*

Appendix A

FRANK I. STROM, II, Deputy Asst. Attorney General; Samuel A. Hirshowitz, First Asst. Attorney General; Louis J. Lefkowitz, Attorney General of New York, *for Respondent.*

WATERMAN, *Circuit Judge:*

In 1949 petitioner Joseph Randazzo was convicted of manslaughter in the first degree after a jury trial in the then Court of General Sessions, New York County, and he was sentenced to a term of imprisonment of six to twenty years. Randazzo requested his retained trial counsel, Mr. Morris Dickman, to take an appeal from the judgment of conviction, and Mr. Dickman filed a timely notice of appeal. Leave was also granted to proceed on the original record and printed briefs, which were to be submitted by a set date. When no record or brief had been filed as directed by the Appellate Division, the State moved to dismiss the appeal for lack of prosecution. Notice of the motion was given to Attorney Dickman, but not to Randazzo. The motion to dismiss was granted by the Appellate Division on February 1, 1950, "no one appearing in opposition thereto." Randazzo now seeks to have this appeal reinstated.

In 1957 Randazzo was released on parole, but was arrested in 1962 for violation of that parole. After arresting Randazzo, the parole officer searched Randazzo's apartment and discovered 31 ounces of heroin. This discovery resulted in an indictment for violation of New York's narcotics laws, and Randazzo pleaded guilty to the crime of attempted possession of a narcotic drug and was sentenced

as a second felony offender to a term of imprisonment of from three to six years.[1]

Having been sentenced as a second felony offender on the narcotics charge and apparently facing imprisonment for the remainder of the manslaughter sentence, Randazzo, acting without counsel, moved, on April 28, 1964, in the Appellate Division for an order vacating the February 1, 1950 dismissal and for an order reinstating his appeal from the manslaughter conviction. The motion was denied without opinion. In July 1964 he sought a writ of error *coram nobis* in the applicable New York Supreme Court, the Supreme Court for New York County, alleging that his manslaughter conviction was invalid because the appeal had been dismissed "without giving notice to him of said dismissal." He also alleged that numerous letters to the Appellate Division and to Mr. Dickman during the appeal period went consistently unanswered. This *coram nobis* application was denied, and the denial was affirmed on appeal by the Appellate Division, 23 A.D.2d 772, 258 N.Y.S.2d 332 (1965). Permission to appeal to the New York Court of Appeals was denied.

In April 1965 Randazzo sought habeas corpus in the United States District Court for the Southern District of New York, setting forth essentially the same contentions raised in his *coram nobis* petition and asserting that he had been deprived of the effective assistance of counsel by Mr. Dickman's actions. This application was denied without a hearing on the grounds that the claim of lack of notice was without merit and that Randazzo had not exhausted his state remedies relative to his claim of ineffective assistance of counsel. This court affirmed the denial in June 1966.

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[1] Randazzo also sought habeas corpus relief relative to this conviction and relief was denied, 282 F. Supp. 10 (SDNY 1968), aff'd, 418 F.2d 1319 (2 Cir. 1969).

Appendix A

In September 1966 Randazzo brought a second motion for a writ of error *coram nobis* in the Supreme Court for New York County. He reiterated his contentions that the failure to give him notice of the State's motion to dismiss the appeal and the ineffective assistance of counsel deprived him of his right to appeal. In a supplementary affidvait, Randazzo also claimed that he was not able to appeal his manslaughter conviction by reason of indigency. In support of this last claim, Randazzo alleged that Dickman had been retained by his father and that Dickman had failed to perfect the appeal because Randazzo's family could not raise the necessary funds to pay the expenses of the appeal and the legal fees demanded. In this connection it is also claimed that Dickman had moved to appeal *in forma pauperis,* but no record of such a motion could be found.

This 1966 motion for *coram nobis* relief was denied. The claims relative to lack of notice and ineffective assistance of counsel were held to be foreclosed by the decision upon the 1964 *coram nobis* application. The newly raised claim of indigency and the supporting allegations were dismissed as "products of [Randazzo's] imagination." About the same time Randazzo brought a separate motion for a *Huntley* hearing to test the voluntariness of certain oral statements made by him to a detective which were admitted against him at his 1949 trial, and this motion was also denied. These denials were all affirmed by the Appellate Division, and leave to appeal to the New York Court of Appeals was denied.

In December 1967 Randazzo commenced the instant habeas corpus proceeding in the Southern District of New York. Again he raised the issues of lack of notice, ineffective assistance of counsel, indigency, and the lack of hearing on the voluntariness of his oral admissions. The petition was denied without a hearing, 282 F. Supp. 2 (SDNY

1968). Judge Wyatt held that even if Randazzo's appeal had been "frustrated," Randazzo was not prejudiced as there was no merit to the points which he could have raised on a direct appeal from the manslaughter conviction. Judge Wyatt disposed of the request for a hearing on the voluntariness of Randazzo's admissions on the grounds that no objection had been made, or indeed could have been made, at trial as to their voluntariness.

Inasmuch as Judge Wyatt concluded that Randazzo suffered no prejudice even if his appeal had been wrongfully frustrated, we are faced with the threshold question of whether a showing of prejudice is necessary. Randazzo relies heavily on *Rodriguez* v. *United States,* 395 U.S. 327 (1969), in which the Supreme Court reversed the Ninth Circuit and held that a petitioner seeking reinstatement of a federal appeal under 28 U.S.C. § 2255 need not even allege the points which he would raise on such a reinstated appeal. Contrary-wise, the State directs our attention to *Buster* v. *Hooker,* 428 F.2d 820 (9 Cir. 1970) (per curiam), in which *Rodriguez* was held inapplicable to federal habeas corpus review of state convictions. However, it appears that the opinion expressed in *Buster* is not necessarily the prevailing view in the Ninth Circuit. In *Gairson* v. *Cupp,* 415 F.2d 352, 354 (9 Cir. 1969), the court, citing *Rodriguez,* stated:

> In reaching this decision we do not pass upon the merits of appellant's direct appeal. It is enough to support the relief requested on appellant's habeas petition to decide that appellant had been deprived of his constitutionally secured right to counsel.

The petitioner Gairson, like Randazzo, was seeking the reinstatement of his appeal from a state conviction. See also *Nelson* v. *Davis,* 414 F.2d 1364 (9 Cir. 1969), *affirming* 278 F. Supp. 852 (CD Calif. 1968). The First Circuit has

squarely held that *Rodriguez* is applicable to state prisoners as well as to federal prisoners. *Wilbur* v. *State of Maine*, 421 F.2d 1327, 1330 (1 Cir. 1970). Compare *Henderson* v. *Cardwell*, 426 F.2d 150, 154-155 (6 Cir. 1970).

Because of the lack of unanimity in the decisions, we turn directly to *Rodriguez*. Rodriguez, like Randazzo, had retained counsel at his original trial. In both cases, the retained counsel was requested to perfect the appeal but failed to do so. With this background, the Court stated:

> Applicants for relief under § 2255 must, if indigent, prepare their petitions without the assistance of counsel. . . . Those whose education has been limited . . . might have grave difficulty in making even a summary statement of points to be raised on appeal. Moreover, they may not even be aware of errors which occurred at trial. . . . Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings. 395 U.S. at 330 [citations omitted].

Except for the possible distinction between federal and state convictions, we see no material difference between *Rodriguez* and the present case. Indeed, the presence of state issues in the present context actually makes Randazzo's case stronger than that of Rodriguez for these state issues should be decided by a state appellate court after argument by counsel there and not by a federal district court without a hearing. Therefore, we hold that *Rodriguez* is applicable to state prisoners seeking the reinstatement of an appeal through federal habeas corpus relief. Inasmuch as petitioners for habeas corpus relief must still show that their direct appeals within the State's appellate

system were indeed frustrated, we do not anticipate that this holding will place an undue burden on either state or federal courts.

Having concluded that the merits of Randazzo's aborted direct appeal are not to be considered in this habeas corpus petition for the purpose of deciding prejudice, we must decide whether Randazzo's appeal was improperly frustrated. The State concedes that, if Randazzo had indeed been indigent at the time of the unperfected appeal, serious constitutional questions would be raised under *United States ex rel. Edwards* v. *Follette,* 399 F.2d 298 (2 Cir. 1968), and *United States ex rel. Sammarco* v. *LaVallee,* 305 F. Supp. 759 (SDNY 1969). However, respondent urges that Randazzo's claim of indigency, not raised until 1966,[2] should not be credited. While we may agree that Randazzo has an uphill battle in demonstrating his asserted indigency in 1950, we cannot sit as a fact-finding panel. Although Randazzo's long delay may tend to discredit his claim, we recognize that an attempt to raise the issue could easily have been considered futile before the rights of indigents on appeal were fully developed. See, e.g., *Entsminger* v. *Iowa,* 386 U.S. 748 (1967); *Douglas* v. *California,* 372 U.S. 353 (1963). Therefore, the case must be remanded to the district court for a hearing on whether Randazzo was indigent at the time of his unperfected appeal in 1950.

As to the claim of ineffective assistance of counsel, again the district court looked to the merits of Randazzo's appeal in deciding whether Mr. Dickman's conduct was such as to shock the conscience of the court and make the pro-

[2] As mentioned above, Randazzo contends that Mr. Dickman filed a motion for leave to appeal *in forma pauperis,* thus raising in 1950 the issue of indigency. However, no record of such a motion has been found. Thus, another factual question is presented which bears upon the claim of indigency.

ceedings a farce and a mockery of justice. *United States* v. *Wight,* 176 F.2d 376, 379 (2 Cir. 1949), *cert. denied,* 338 U.S. 950 (1950); *United States* v. *Currier,* 405 F.2d 1039, 1043 (2 Cir.), *cert. denied,* 395 U.S. 914 (1969). Had Dickman consulted with Randazzo as to the usefulness of the appeal and if Randazzo had then, after consultation with counsel, decided not to appeal, it is clear that the merits of the appeal would be quite relevant to the quality of Mr. Dickman's representation and advice. However, that is not the case before us. Randazzo claims that Mr. Dickman unilaterally decided not to prosecute the appeal without giving any notice to him. While counsel may not need to consult with his client on all tactical aspects of an appeal, cf. *United States ex rel. Agron* v. *Herold,* 426 F.2d 125 (2 Cir. 1970), clearly the client should be informed that counsel has decided to abandon the case so that the client may find alternative means of representation if he so desires. *Benoit* v. *Wingo,* 423 F.2d 880 (6 Cir.), *cert. denied,* 91 S. Ct. 45 (1970). Thus, if Randazzo was indeed unaware of Mr. Dickman's decision not to perfect the appeal, he was deprived of his right to the effective assistance of counsel. As with the claim of indigency, a hearing is required to determine the facts on this issue. While we realize that Mr. Dickman's death in 1953 poses a significant hurdle in the fact-finding process, we are confident that counsel will be thorough in collecting some remnants of previous communications between Mr. Dickman and Randazzo or Randazzo's family.

The question of the lack of notice of the motion to dismiss the appeal remains. The State argues that we should consider this court's affirmance of the denial of Randazzo's 1965 habeas corpus petition as dispositive. However, there has been considerable intervening development of the law concerning the rights of defendants on appeal. See, e.g., *Anders* v. *California,* 386 U.S. 738 (1967); *Entsminger* v.

Iowa, 386 U.S. 748 (1967); *United States ex rel. Smith* v. *McMann,* 417 F.2d 648 (2 Cir.), *cert. denied,* 397 U.S. 925 (1970); *United States ex rel. Witt* v. *LaVallee,* 424 F.2d 421 (2 Cir. 1970). Because a hearing is already required on other aspects of Randazzo's petition, the claim of lack of notice should also be reconsidered by the district court. *Saunders* v. *United States,* 373 U.S. 1, 15-17 (1963).

Finally, Randazzo claims that he was improperly denied a "Huntley hearing" in the state courts as to the voluntariness of certain statements which were admitted against him at trial. However, the record before us does not indicate any facts or allegations which would lead us to conclude that Randazzo's statements to the police detective were indeed involuntary. Without such a showing, habeas corpus is not available to correct possible deficiencies in the procedures used to decide the issue of voluntariness in the state courts. *Procunier* v. *Atchley,* 91 S. Ct. 485 (1971).

The case is remanded for a hearing on the issue of whether Randazzo's 1950 appeal was improperly frustrated.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICE OF NEW YORK

67 Civ. 4790

UNITED STATES OF AMERICA ex rel. JOSEPH RANDAZZO,

Petitioner,

against

HON. HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Respondent.

APPEARANCES:

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Attorney General of the State of New York,
Attorney for Respondent.
JOEL H. SACHS, ESQ.,
Assistant Attorney General,
Of Counsel.
JOSEPH RANDAZZO, Acting for Himself.

WYATT, District Judge,

This is an application for a writ of habeas corpus (28 U.S.C. §§ 2241, 2242) by Joseph Randazzo, who is in the custody of the penal authorities of New York at Green Haven Prison in Stormville, Dutchess County, in this District. Randazzo is acting for himself, without the help of counsel; by order of Judge McGohey filed December 6, 1967, he was authorized to prosecute this proceeding without prepayment of fees, etc. (28 U.S.C. § 1915(a)).

There was a judgment of conviction of applicant of manslaughter in the first degree (Penal Law § 1050 as it then

stood) on February 17, 1949, in the old Court of General Sessions for New York County (Schurman, J.). The sentence was imprisonment for from six to twenty years (Penal Law § 1051 as it then stood). The judgment was on a jury verdict; the indictment (Index No. 2560/1948) was for murder in the second degree, punishable by imprisonment for from twenty years to life (Penal Law §§ 1046, 1048, as they then stood).

Randazzo contends that detention under this conviction (sometimes herein the "manslaughter" conviction) violates his federal constitutional rights (1) because his appeal from the conviction was "frustrated" (he means, presumably, by the state) and (2) because the state denied him a hearing under the rule of *People* v. *Huntley,* 15 N.Y.2d 72; 255 N.Y.S.2d 838 (1965) carrying into effect the "separate hearing" on the voluntary character of a confession required by *Jackson* v. *Denno,* 378 U.S. 368 (1964).

I

Before the trial on the second degree murder charge Randazzo, at the request of his counsel, was committed to Bellevue Hospital for psychiatric examination.

The evidence at the trial established that Randazzo about three o'clock in the morning of August 8, 1948, on the lower East side in Manhattan, hit a man at least twice on the head and face with a baseball bat, using both hands and with much force; from his injuries, the man died some hours later. Randazzo was then about 20 years old, separated from his wife and living in the neighborhood with his parents. Self-defense was the explanation of Randazzo, who testified at his trial. The jury, by its verdict, rejected this explanation. As noted above, the judgment of conviction was entered on February 17, 1949; the sentence was imprisonment for from six to twenty years.

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Randazzo was represented at his trial by retained counsel, Morris Dickman, Esq.

The term of imprisonment of Randazzo began on February 21, 1949, the date he was received at Sing Sing Prison (Correction Law § 231).

Mr. Dickman timely filed a notice of appeal on March 11, 1949.

By order entered July 12, 1949, the Appellate Division, First Department, granted a motion for Randazzo for permission to prosecute the appeal on the original record (not printed) but with printed briefs; the Court ordered that the record with points on appeal be filed by September 2, 1949. This was not done.

By order entered February 1, 1950, a motion by the People to dismiss the appeal for failure to prosecute was granted by the Appellate Division. No one appeared for Randazzo in opposition. Notice of the motion was given to counsel but not to Randazzo.

On December 17, 1953, Mr. Dickman died (N. Y. Law Journal, December 24, 1953).

According to records of the Parole Board, Randazzo was released on parole in January 1954 from the correctional institution at Comstock but was returned to prison in the following month as a parole violator.

In July 1956, Randazzo, acting without counsel, moved in the New York Supreme Court to obtain a copy of the pretrial report on his psychiatric examination; a copy had been given Mr. Dickman but he had died in 1953. In March 1957, this motion was denied on the ground that Randazzo was in custody as a result of the manslaughter conviction and not by reason of the psychiatric examination.

On March 26, 1957, Randazzo was released on parole from Clinton Prison (Correction Law, Art. 8, see § 213).

In January 1961, Randazzo, acting by David Markowitz, Esq., as retained counsel, moved in the New York Supreme Court for a writ of error *coram nobis* to vacate the man-

slaughter conviction. The ground was that the District Attorney had suppressed evidence favorable to Randazzo in the psychiatric report. The Court (Postel, J.) set the matter down for a hearing but in June 1961 the motion was withdrawn by Randazzo and his counsel.

In July 1962, information reached the Parole Board that Randazzo was, among other things, associating with a major narcotics violator and was believed to be in the narcotics traffic. The Board on July 10, 1962 issued a warrant for his retaking (Correction Law § 216).

On July 12, 1962, a parole officer and one or more police detectives went to the apartment building on Rivington Street on the lower East side where Randazzo lived; in his third floor apartment he was arrested by the parole officer under authority of the Parole Board warrant. At the same time the parole officer searched the premises and in the bedroom of Randazzo found 31 ounces of heroin concealed in a hollow in a dresser drawer; the parole officer did not have a search warrant.

When the narcotic drug was discovered, the parole officer turned Randazzo over to the police detectives for prosecution; Randazzo was then taken to the Manhattan House of Detention (125 White Street) to await grand jury action and the Board of Parole warrant was filed at the House of Detention.

An indictment (Index No. 3035/1962) charging Randazzo in two counts with possession of narcotic drugs with intent to sell (Penal Law § 1751(2), as it then stood) and with possession of narcotic drugs (Penal Law § 1751(3) as it then stood) was returned by a New York County grand jury on August 31, 1962.

Randazzo (or his family) retained counsel, Jesse Zaslav, Esq., who moved to suppress as evidence the heroin found in his bedroom on the ground that the search without warrant had violated constitutional rights. There was a hear-

ing on the Supreme Court (Davidson, J.) and on November 15, 1962 the motion was denied with an opinion (37 Misc. 2d 80, 234 N.Y.S.2d 740).

Randazzo then pleaded guilty on November 29, 1962 to attempted possession of a narcotic drug (Penal Law § 1751(5) as it then stood); judgment of conviction (sometimes herein the "narcotics" conviction) was entered on that plea on December 20, 1962; the sentence was imprisonment for from three to six years, Randazzo being then a second felony offender (Penal Law § 1941 as it then stood) because of the prior manslaughter conviction.

There was an appeal, as permitted after denial of a suppression motion and a plea of guilty (Code of Cr. Proc. § 813-c). The appeal was prosecuted by Mr. Zaslav, the retained counsel.

The Appellate Division on March 31, 1964 unanimously affirmed without opinion (20 App.Div. 2d 850, 248 N.Y.S.2d 203).

On April 28, 1964, the Appellate Division, First Department, denied a motion by Randazzo, acting without counsel, to vacate the order of dismissal of February 1, 1950 and to reinstate his appeal from the manslaughter conviction; his papers dated March 18, 1964 claimed that he had never received any notice of the motion to dismiss that appeal.

On May 18, 1964, Judge Fuld made a certificate granting permission to appeal from the narcotics conviction (Code of Cr. Proc. § 520(1)). Apparently Mr. Zaslav, the retained counsel, then withdrew; in June 1964, the Court of Appeals assigned counsel to represent Randazzo.

The issue before the Court of Appeals was solely the constitutional validity of the search during which the heroin was found. On October 15, 1964, the search was upheld and the judgment affirmed, Judge Fuld dissenting with a short opinion (15 N.Y.2d 526, 254 N.Y.S.2d 99). Certiorari was denied by the Supreme Court on June 7, 1965 (381 U.S. 953).

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In July 1964, Randazzo, acting without counsel, moved in the New York Supreme Court for a writ of error *coram nobis* to vacate the manslaughter conviction. The ground was that his appeal had been dismissed in the Appellate Division on February 1, 1950, without any notice to him. By order (with memorandum opinion) entered October 7, 1964, the Court (Postel, J.) denied this motion without a hearing, noting that, while it was then required that notice of dismissal of appeal be given to defendants personally, the statute (Code of Cr. Proc. § 537-a) had become effective September 1, 1963 and was not retroactive. The Appellate Division unanimously affirmed this order on March 2, 1965 (23 A.D.2d 722, 258 N.Y.S.2d 332). Judge Fuld on April 9, 1965, refused to make a certificate granting permission to appeal to the Court of Appeals (Code of Cr. Proc. § 520(1)).

On May 24, 1965, this Court (Judge Croake) took under advisement an application (65 Civ. 1179) by Randazzo, acting without counsel, for a writ of habeas corpus. The grounds appear to have been (a) that the dismissal on February 1, 1950 of his appeal from the manslaughter conviction without notice to him personally was a violation of federal constitutional rights and (b) that (among possibly other grounds) he was without the effective assistance of counsel on his appeal because his counsel was "either incapacitated or deceased during the crucial appeal period".

By order, with opinion, filed June 15, 1965, Judge Croake denied the application without a hearing. As to ground (a) the denial was because it had no merit; as to ground (b), the denial was because state remedies had not been exhausted (28 U.S.C. § 2254).

By order filed July 19, 1965, Judge Croake issued a certificate of probable cause (28 U.S.C. § 2253), granted authority to appeal without prepayment, etc. (28 U.S.C.

§ 1915(a)), and assigned Legal Aid Society "to handle the appeal".

By order filed June 17, 1966, the Court of Appeals for this Circuit affirmed without opinion the order of Judge Croake.

Apparently seeking a state remedy as indicated in Judge Croake's opinion, Randazzo, acting without counsel, in September 1966 moved in the New York Supreme Court for a writ of error *coram nobis*. Again he urged that his appeal from the manslaughter conviction had been wrongfully dismissed without notice to him, but he added the further ground that he had been deprived of his right to appeal because of "death or incapacitation" of his counsel (Mr. Dickman) or "misrepresentation" or "act of fraud" of his counsel "after having accepted a fee and having contracted to go ahead".

In a "supplementary affidavit", apparently not sworn to but dated September 20, 1966, Randazzo states that Mr. Dickman, his counsel in the proceedings in which there was the manslaughter conviction, told his father (who had retained Mr. Dickman) that nothing more could be done about the appeal because his father had no funds "to purchase the trial record and the costs of printing the briefs" and to pay legal fees and that "thereafter" the appeal was "dismissed". This is, in part at least, false because, as has been seen, the Appellate Division had permitted appeal on the original record.

By notice dated September 15, 1966, Randazzo made a second motion in the New York Supreme Court for a writ of error *coram nobis* as to the manslaughter conviction. This motion advanced the claim that a police officer had testified at the trial to an "oral confession" in which Randazzo "admitted his guilt"; and that a separate hearing as to whether the "confession" was voluntary was required under *People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S. 2d 838 (1965).

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By an order entered November 23, 1966, the Court (Schweitzer, J.) denied without a hearing the two motions for a writ of error *coram nobis* as to the manslaughter conviction. There had been two opinions filed earlier. In the opinion on the first motion, judicial notice was taken of the fact that Mr. Dickman had died in December 1953 and had been in active practice in February 1950, when the appeal from the manslaughter conviction was dismissed; thus he had not been dead or incapacitated at that time. In the opinion on the second motion, the Court stated that no "Huntley" hearing was required because no question had been raised at trial as to "the voluntariness of any statement made by the defendant".

Randazzo, continuing to act without counsel, took an appeal to the Appellate Division from the order entered on November 23, 1966. The Appellate Division unanimously affirmed on June 20, 1967 (282 N.Y.S.2d 641). A certificate granting permission to appeal to the Court of Appeals was refused by Chief Judge Fuld on October 4, 1967.

Randazzo had been in custody since his arrest on the parole violation warrant on July 12, 1962. At least since the narcotics conviction on December 20, 1962, Randazzo was serving his sentence on the manslaughter conviction only; this is because Penal Law § 2190(2) (as it stood before September 1, 1967) provided that if a person under sentence for a felony is thereafter convicted and sentenced to imprisonment, the term under the second sentence does not begin until the expiration of the term under the first sentence.

Effective September 1, 1967, the Penal Law was extensively revised and changes were also made in the Correction Law.

Provision was made for the "conditional release" of a prisoner, if he requests it, whenever his good behavior

time equals the unserved portion of the maximum term being served (Penal Law § 70.40(1)(b)).

According to information supplied by an Assistant Attorney General, Randazzo on December 1, 1967 received a "conditional release" from imprisonment under the sentence imposed on the manslaughter conviction and is now serving the sentence imposed under the narcotics conviction.

II

On this application for a writ of habeas corpus, applicant attacks his manslaughter conviction for claimed violation of his federal constitutional rights.

As just seen, however, the respondent Warden is not detaining him under that conviction. Having been "conditionally released" from custody under that conviction, he is "under the supervision of the state board of parole" (Penal Law § 70.40(1)(b)) and "in the legal custody of the board of parole" (Correction Law § 827(6)). This would be a sufficient custody status to support a jurisdiction to issue the writ and to grant relief (*Jones* v. *Cunningham*, 371 U.S. 236 (1963)) if the members of the Board of Parole were parties here. They are not parties, however, and this Court has presently no jurisdiction over them in respect of the status of this applicant.

The Warden, however, is detaining Randazzo under the narcotics conviction for which he was sentenced on December 20, 1962. As we have seen, Randazzo was sentenced as a second felony offender (Penal Law § 1941 as it then stood), this because of the prior manslaughter conviction.

If the prior manslaughter conviction be invalid for violation of constitutional rights, as applicant here asserts, he should have been sentenced on the narcotics conviction as a first offender. If it is possible that on such a resentencing under the narcotics conviction as a first offender,

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Randazzo could receive a sentence shorter than the period already served since December 20, 1962, then an order directing his release from custody under the narcotics conviction would be warranted. *United States ex rel. Durocher* v. *LdVallee,* 330 F.2d 303, 305 n.2 (2d Cir. 1964); *United States ex rel. Smith* v. *Martin,* 242 F.2d 701 (2d Cir. 1957); *United States ex rel. Foreman* v. *Fay,* 184 F.Supp. 535 (S.D.N.Y. 1960).

If Randazzo were now resentenced on the narcotics conviction, the provisions of the Penal Law at it stood at the time of the commission of the offense in 1962 would be applicable. The revised Penal Law so provides (§ 5.05(3)). On resentence, therefore, the punishment would have to be imprisonment for an indefinite term of 1½ to 5 years (Penal Law § 1751(5) and (3) as it then stood). Thus, Randazzo could now receive a sentence shorter than the time he has served since December 20, 1962—more than five years. If his manslaughter conviction be invalid, then (according to the cases cited above) it would be appropriate by order to direct his release from custody under the narcotics conviction.

Is this conclusion affected by the fact that if so released from physical custody by the Warden, Randazzo would be in a "conditional release" status until jurisdiction over the Board of Parole were obtained? The only relief which can be given in a habeas corpus proceeding is release from custody; if all the contentions made in the application be sustained but if for some other reason retention of the applicant in custody is lawful, then the writ cannot be used. *McNally* v. *Hill,* 293 U.S. 131 (1934). In the case at bar, release of applicant from physical custody under the narcotics conviction would leave him still in the legal custody of the Parole Board in a "conditional release" status. The Supreme Court has ruled that if discharge of the applicant from physical custody is proper, the writ

may be used even though the applicant would then be in a parole status. *Ex Parte Hull*, 312 U.S. 546 (1941).

On the basis of the analysis made, it is concluded that the custody status of Randazzo may properly be tested in this Court by the present application for a writ of habeas corpus.

III

The extensive litigation in the state courts since Judge Croake's decision in June, 1965, establishes that Randazzo has now "exhausted the remedies available in the courts of the state". 28 U.S.C. § 2254(b). There may be a state procedure for resentence (Correction Law § 601-a) which theoretically would be available to him but if so there are "circumstances", namely, prior decisions in his case, which make this remedy "ineffective" (28 U.S.C. § 2254).

IV

It has taken much longer to reach the merits than it requires to dispose of the various claims here made.

Randazzo claims that his appeal from the judgment of conviction of February 17, 1949 was "frustrated". He does not spell out in his application how this was done but asks for an "evidentiary hearing". I have examined all the papers submitted with the application, which include the points made in the state courts. I have also examined records of the state courts, including the stenographic minutes of the trial, and have caused other records to be examined for me. The facts do not appear to be "in dispute" and therefore no evidentiary hearing is necessary. *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963).

That his retained counsel was dead or mortally ill at the time when the appeal could have been prosecuted is dis-

proved by the fact, not capable of dispute, that counsel died almost four years after the manslaughter conviction and continued in active practice after that conviction. Moreover, it is difficult to see how the state could be held in any way responsible for the health of a lawyer retained by or for Randazzo; surely when he heard nothing of the progress of the appeal, it was the duty of Randazzo at least to make inquiry of the state court but instead he did nothing about the appeal for at least fourteen years. During over five years of this period, Randazzo was not in prison but perfectly free personally to investigate his appeal; he did nothing.

If retained counsel failed to prosecute an appeal when "he knew an appeal was meritorious" or if his conduct in respect of the appeal was such as to shock the conscience of the court and make the proceedings a farce and a mockery of justice, then constitutional rights of Randazzo have been violated. This is the teaching of *United States ex rel. Masselli* v. *Reincke,* 383 F.2d 129, 131-32 (2d Cir. 1967). But this teaching is to be followed, according to the opinion cited (383 F.2d at 133, fn. 4), "in extreme situations and then only when the defendant is obviously prejudiced thereby".

We look to see what errors are claimed to have occurred at the trial of Randazzo in 1949. For this, the motion in the state court in 1966 for a writ of error *coram nobis* has been examined.

It is said to have been error to permit the testimony of Detective O'Hara to "damaging admissions" made by Randazzo on December 2, 1948, when he was without counsel but under indictment and released on bail. Assuming that *Massiah* v. *United States,* 377 U.S. 207 (1964) gives substance to this claim, the decision is not applicable to trials concluded before the date of the decision (May 18, 1964). *United States ex rel. Romano* v. *Fay,* 360 F.2d 389,

393-98 (2d Cir. 1966), cert. denied *sub nom., Romano* v. *Follette,* 385 U.S. 1020 (1967).

It is said to have been error to exclude evidence of the "character or disposition" of the deceased in connection with the defense that the homicide was "justifiable" (Penal Law § 1055 as it then stood). The stenographic minutes show that the only evidence excluded at trial which was remotely of this sort was whether the police took fingerprints of the deceased to find out "whether or not he had a criminal record" (SM 93). It was not claimed at trial that deceased in fact had a criminal record. In any event, the character of the deceased "with reference to violence" is only relevant "when known to the accused". *People* v. *Flournoy,* 14 A.D.2d 854, 221 N.Y.S. 2d 142 (1st Dept. 1961); Randazzo at trial testified that he did not know the deceased at all and had never seen him before the fatal incident (SM 114, 125).

It is said to have been error to poll only eleven jurors. This is factually incorrect, as established by the stenographic minutes (SM 193-94); twelve jurors were polled.

The claimed trial errors thus had no merit and even if the state had "frustrated" the appeal—which was not the case—Randazzo was in no way prejudiced.

The remaining ground urged for this application is that the state denied Randazzo a hearing as to the voluntary character of his "confession" to Detective O'Hara. *Jackson* v. *Denno,* 378 U.S. 368 (1964). This is the same "confession" which was earlier noticed in connection with a claim that it was inadmissible because taken in the absence of counsel. When Detective O'Hara testified at the trial, the objection was that what Randazzo said to him was "incompetent, immaterial, irrelevant to the issues in this case" and "there is a long lapse of time since the arrest" (SM 60). There was no challenge to the "confession" as "involuntary" and it is difficult to see how there could

have been any such challenge. Randazzo was not in custody; he apparently freely answered the few questions of O'Hara. There was no cross-examination of O'Hara, either as to the circumstances of the "confession" or as to anything else. Indeed, there is no present claim by Randazzo that his "confession" was "involuntary". *Jackson* v. *Denno* deals only with "involuntary confessions" (378 U.S. at 385) and there must be some challenge at trial of the voluntary character of the confession. The claims of Randazzo are in this respect without merit.

The relief requested in this application for a writ of habeas corpus is denied and the application is dismissed.

So Ordered.

Dated: New York, New York, March 26, 1968.

Inzer B. Wyatt,
Inzer B. Wyatt,
United States District Judge.